OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 86-8 14 August 1986

TO: All Regional Directors, Officers-In-Charge, and Resident Officers

FROM: Rosemary M. Collyer, General Counsel

SUBJECT: Guideline Memorandum Concerning Continuity of Bargaining Representative after Affiliations, Mergers and Similar Changes

In its recent decision in Seattle-First National Bank, 1/ the Supreme Court held that the Board could not require a union to allow non-members to participate in union affiliation votes as a condition of amending an outstanding certification or issuing a bargaining order on behalf of the newly affiliated union. Thus, assuming arguendo that the affiliation does not result in the creation of a different entity, the employer is obligated to bargain with the newly-affiliated union even if non-members did not participate in the affiliation vote. On the other hand, "[i]f the organizational changes accompanying affiliation [are] substantial enough to create a different entity, the affiliation raise[s] a 'question concerning representation', which [can] only be resolved through the Board's election procedure." 2/

The determination of whether an affiliation results in the creation of a different entity is called a "continuity" determination. 3/ The Court clearly stated that the Board possesses the statutory authority to make the "continuity" determination. 4/ This memorandum sets forth the relevant precedents to assist Regional Offices in making this determination.5/

1/ NLRB v. Financial Institution Employees, Local 1182 (Seattle-First National Bank), ____U.S.____, 121 LRRM 2741 (1986).

2/ Seattle-First National Bank, supra at 2745.

3/ Id. at n. 7 and accompanying text.

4/ Id. at 2749, n. 13.

5/ Although Seattle-First National dealt with an affiliation, we believe that the "continuity" determination must be made in cases involving other organizational changes as well. These include: mergers or affiliations between international unions, disaffiliations of locals from international unions, the merger of one local union into another, the creation of a new local union from the amalgamation of several locals or by severing a

The Board examines the nature of the collective bargaining representative after an organizational change to determine whether the change raises a question concerning representation ("qcr") requiring a Board-conducted election. 6/ The Board has found a qcr where a certified union completely lost its identity through a reorganization 7/ or where some portion of the old union survived as a functioning viable entity and opposed the change. 8/ On the other hand, not every organizational change will "result in displacement of the employer-bargaining representative relationship." Canton Sign Co., 174 NLRB 906, 909 (1969), enf. denied on other grounds, 457 F.2d 832 (6th Cir. 1972). Thus, in general, an affiliation between international unions that results in little more than a name change for the locals has not been considered to raise a qcr. 9/

Between the extremes of total loss of identity and a mere name change lies the great bulk of cases involving organizational changes that may or may not be sufficient to raise a qcr. In general, the Board considers whether there have been changes "in the rights and obligations of the union's leadership and membership, and in the relationships between the putative bargaining agent, its affiliate, and the employer," J. Ray McDermott & Co. v. NLRB, 571 F.2d 850, 857 (5th Cir. 1978), cert. denied 439 U.S. 893 (1978). In this inquiry, "the party claiming irregularity or dissimilarity of bargaining agents [has] the

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portion of another local. All such changes are referred to herein as organizational changes.

6/ The Board consistently has applied the same standards in representation proceedings, generally involving amendments to certifications, as in unfair labor practice cases alleging an employer's refusal to bargain with a "new" union. Independent Drug Store Owners, 211 NLRB 701, n. 2 (1974), enf. per curiam sub nom. Retail Clerks, Local 428 v. NLRB, 528 F.2d 1225 (9th Cir. 1975).

7/ See, e.g., Gas Service Co., 213 NLRB 932 (1974); Independent Drug Store Owners, supra; Gulf Oil Corp., 135 NLRB 184 (1962).

8/ See, e.g., Baldor Electric Co., 258 NLRB 1325 (1981); Illinois Grain Corp., 222 NLRB 495 (1976); Factory Services, Inc., 193 NLRB 722 (1971); Missouri Beef Packers, Inc., 175 NLRB 1100 (1969).

9/ See, e.g., Knapp-Sherrill Co., 263 NLRB 396 (1982); Texas Plastics, Inc., 263 NLRB 394 (1982); Warehouse Groceries Management, Inc., 254 NLRB 252 (1981), enfd. 111 LRRM 2137 (11th Cir. 1982); Aurelia Osborn Fox Memorial Hospital, 247 NLRB 356 (1980); American Enka Co., 231 NLRB 1335 (1977); Pearl Bookbinding Co., 206 NLRB 834 (1973), enfd. 577 F.2d 1108 (1st Cir. 1975).

affirmative obligation of supporting its claim." Insulfab Plastics, Inc., 274 NLRB No. 126, ALJD, sl. op. at 11 (1985), enfd. ___F.2d___, 122 LRRM 2105 (1st Cir. 1986). As will be more fully discussed below, the Board determines whether there have been significant changes in the following: officers, staff, internal structure, daily operations, dues structure and constitution and by-laws. Most importantly, the Board considers whether the bargaining representative has preserved its previous level of autonomy by, for example, continuing to conduct its own contract negotiations and strike votes and by retaining its assets and resources. Finally, the Board considers whether the post-change entity is willing to assume the contractual commitments of its predecessor. 10/ If these factors establish substantial continuity, the Board will find the union to be the bargaining representative even if the union is part of a much larger entity after the organizational change. 11/

Following is a breakdown of some of the factors relied upon most often by the Board in assessing whether there has been substantial continuity in the bargaining representative after an organizational change. Clearly, no one factor is dispositive of the issue. Indeed, the Board has stressed different considerations at various times in the past and appears to examine the "totality of

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10/ Quemetco, Inc., 226 NLRB 1398, 1399 (1976); National Carbon Co., 116 NLRB 488, 500-01 (1956), enfd. per curiam 244 F.2d 672 (6th Cir. 1957). For a general discussion of factors considered by the Board, see NLRB v. Insulfab Plastics, Inc., 122 LRRM at 2109; NLRB v. Pearl Bookbinding, 517 F.2d 1108, 1111-12 (1st Cir. 1975); Ventura County Star-Free Press, 279 NLRB No. 64, ALJD, sl. op. at 14-15 and cases cited therein (1986); National Carbon Co., 116 NLRB 488 (1956), enfd. per curiam 244 F.2d 627 (6th Cir. 1957).

11/ See, e.g., Insulfab Plastics, supra, 274 NLRB No. 126, ALJD at 15; Aurelia Osborn Fox Memorial Hospital, supra, 247 NLRB at 359; New Orleans Public Service, Inc., 237 NLRB 919, 921 n. 11 (1978); Kentucky Power Co., 213 NLRB 730, 731 (1974); Canton Sign Co., supra, 174 NLRB at 908-09; Montgomery Ward Co., 188 NLRB 551 (1971). In contrast, the relative size and economic power of the two entities has been a major factor cited by the Third Circuit when denying enforcement to Board orders requiring employers to bargain with newly affiliated unions. American Bridge Division, U.S. Steel Corp. v. NLRB, 457 F.2d 660 (3rd Cir. 1972), denying enf. to 185 NLRB 669 (1970); NLRB v. Bernard Gloekler North East Co., 540 F.2d 197 (3rd Cir. 1976), denying enf. to 217 NLRB 626 (1975); Sun Oil Co. of Pa. v. NLRB 576 F.2d 553 (3rd Cir. 1978), denying enf. to 228 NLRB 1063 (1977) and 228 NLRB 1072 (1977). See also Amoco Production Co., 239 NLRB 1195, 1198 (1979) (Member Penello, dissenting).

a situation" rather than "the presence or absence of certain cited criteria." 12/ All that can be said is that if few or none of these factors are present, it is unlikely that the Board will find substantial continuity, unless the employer has acquiesced in the change. 13/

Officers and Staff

Among the primary considerations in assessing continuity is whether officers and administrative personnel have been retained. 14/ The fact that the officers are retained in a somewhat different capacity will not necessarily mean that this element is not satisfied if the officers maintain the same or similar relationship to their unit. Thus, in William B. Tanner Co, 212 NLRB 566 (1974), enf. denied per curiam 517 F.2d 982 (6th Cir. 1975), the Board noted that the local remained a semiautononous union after its merger into another local, with the same officers and the same agents to administer its contracts. 15/ Similarly, in Newspapers, Inc., 210 NLRB 8 (1974), enfd. 575 F.2d 334 (5th Cir. 1975), the officers of the division servicing the unit in question remained the same even though none of the officers served in that capacity in the new local union. In National Carbon Co., 116 NLRB 488 (1956), enfd. per curiam 244 F.2d 672 (6th Cir. 1957), both of the merged locals maintained equal representation after the merger in terms of officers, executive board members and district directors.

Continuity in the administration of collective-bargaining agreements is also extremely important. Thus, in McKesson Wine & Spirits Co., 232 NLRB 210 (1977), two of the officers of the union left the union after the change. Notwithstanding this, the Board found the requisite continuity based in large part on the fact that the remaining officials continued to negotiate agreements and

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12/ Yates Industries, Inc., 264 NLRB 1237, 1250 (1982).

13/ See, e.g., Ventura County Star-Free Press, supra; (Employer estopped from challenging affiliation based on post-affiliation bargaining). Accord: Knapp-Sherrill Co., supra.

14/ See, e.g., Aurelia Osborn Fox Memorial Hospital, supra; Newspapers, Inc., 210 NLRB 8, 9 (1974), enfd. 515 F.2d 334 (5th Cir. 1975); Gasland Inc., 239 NLRB 611 (1978); New Orleans Public Service, Inc., supra, 237 NLRB at 921. Cf. Gas Service, Inc., supra; Independent Drug Store Owners, supra (no continuity found, based, inter alia, on fact that none of the officers was retained). But see Quemetco, Inc., supra; Canton, Sign, supra (continuity found despite failure to retain officers and staff).

15/ See also New Orleans Public Service Inc., supra.

process grievances. 16/ In Montgomery Ward & Co., 188 NLRB 581 (1971), it was considered significant that, after the merger of the bargaining representative into a much larger union, the same business agent continued to service the bargaining units exactly as he had before the merger, and the business agent served on the executive board of the post-merger union.

Constitution and Bylaws

Where the constitution and/or bylaws governing the union after reorganization are the same as before the change, the Board notes that fact as a consideration pointing to substantial continuity. 17/ On the other hand, the Board often has found continuity despite a finding that the constitution and bylaws have been completely supplanted by those of the new entity. 18/ Accordingly, although this factor is relevant in establishing continuity, the absence of the factor does not establish a lack of continuity.

Dues Structure

Another factor that is often noted but is not dispositive of the continuity issue is the retention of the dues system. Thus, although the Board has pointed to the same dues payments as significant, 19/ it has not found a lack of continuity where there

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16/ See also Aurelia Osborn Fox Memorial Hospital, supra; Kentucky Power Co., supra, 213 NLRB at 731.

17/ See, e.g., Insulfab Plastics, supra; Texas Plastics, supra; McKesson Wine & Spirits, supra; Pearl Bookbinding Co., supra, 206 NLRB at 836. See also Warehouse Groceries Management, Inc., supra, 254 NLRB at 256 (new international allowed some discrepancies in locals' constitutions and bylaws).

18/ New Orleans Public Service, supra; Ocean Systems, 223 NLRB 857, 859 (1976) enfd. sub nom. J. Ray McDermott & Co. v. NLRB, 571 F.2d 850 (5th Cir. 1978), cert. denied 439 U.S. 893 (1978); East Ohio Gas Co., 140 NLRB 1269, 1271 (1963); Lloyd A. Fry Roofing Co., 118 NLRB 587 (1957); National Carbon Co., supra.

19/ Insulfab Plastics, supra; Texas Plastics , supra; Aurelia Osborn Fox Memorial Hospital, supra; Ocean Systems, supra; McKesson Wine & Spirits, supra.

has been a dues increase 20/ or where the union loses control of the dues money after the change. 21/

Assets and Resources

Retention by the bargaining representative of the resources owned by it prior to reorganization is also considered significant by the Board, 22/ but not dispositive. 23/

Autonomy

In general, the Board has not found continuity unless it could establish that the original bargaining representative exercised substantial autonomy in its operations after the change. 24/ In cases where the Board has found no continuity, the Board points to a "total loss of identity" on the part of the union undergoing the change. 25/ The inquiry into the degree of autonomy covers such factors as control over contract negotiations and grievance processing, independence in calling strikes and allocating strike benefits, and the authority to ratify agreements. It also includes such factors as control over resources and establishment of dues and fees. 26/ As stated by the Board in Montgomery Ward & Co., supra, in which a small amalgamated local merged with a larger amalgamated local of the same international, "employee members of each bargaining unit . . . continue to exercise significant control over their own destiny. . . . " 188 NLRB at 552. It was such continuing "local autonomy" that caused the First Circuit to enforce the Board's bargaining order in

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20/ Knapp-Sherrill Co., supra; New Orleans Public Service, supra; Sun Oil Co., 228 NLRB 1063 (1977), enf. denied 576 F.2d 553 (3rd Cir. 1978).

21/ Quemetco, supra; Canton Sign Co., supra.

22/ See, e.g., Insulfab Plastics, supra; Aurelia Osborn Fox Hospital, supra; Pearl Bookbinding, supra.

23/ Texas Plastics, supra; Montgomery Ward & Co., supra; Canton Sign, supra; Lloyd A. Fry, supra; National Carbon Co., supra.

24/ For a general discussion of the importance of unit autonomy, see Retail Store Employees Union, Local 428 v. NLRB, 528 F.2d at 1228; Gasland, Inc., 239 NLRB at 611-12.

25/ See cases cited at note 7 supra.

26/ See, e.g., Insulfab Plastics, supra; Aurelia Osborn Fox Memorial Hospital, supra; Gasland, Inc., supra.

Insulfab Plastics, despite the structural changes and increased obligations incurred by the union. 27/ Often autonomy is retained because the bargaining representative has become a quasi-independent entity within the larger union after reorganization. 28/ Indeed, in Kentucky Power Co., 213 NLRB 730, 731 (1974), the Board noted that the unit employees arguably had more autonomy after the merger than before because they had acquired separate representation on the new local's executive board.

Concededly, the Board has on occasion found the requisite continuity even where the old entity retained no independent identity after a merger 29/ or affiliation 30/ In these cases, there was an overwhelming showing of support by unit employees for the new representative. 31/ The reasoning of these cases is open to question inasmuch as the issue of whether the union is a different entity is analytically distinct from the issue of whether the employees support the new entity. Phrased differently, if the change results in a qcr, the employer may be entitled to a Board election, even if the new entity has majority support. 32/

Submissions to Advice

If it is clear, under Board law, that continuity can be shown or that it cannot be shown, the Region should proceed accordingly. Otherwise, the case should be submitted to Advice.

Other Matters

Assuming arguendo that the change does not result in the creation of a new and different entity, there may nonetheless be issues concerning a lack of due process in accomplishing the change. In Seattle-First, the Supreme Court held only that the union was not required to allow non-members to vote concerning the change. Although the Court's opinion suggests that such a change, not resulting in a qcr, is a wholly internal matter, the Court does

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27/ NLRB v. Insulfab Plastics, Inc., 122 LRRM at 2109.

28/ See, e.g., American Enka Co., supra, 231 NLRB at 1337; William B. Tanner Co., supra; Newspapers, Inc., supra.

29/ Canton Sign, supra.

30/ Quemetco, Inc., supra.

31/ Compare Safway Steel Scaffolds Co. of Georgia, 173 NLRB 311 (1968) with Rinker Materials Corp., 162 NLRB 1688, (1967).

32/ See Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974).

not resolve the issue concerning the impact of a lack of due process in accomplishing the change. Conceivably, a change that was accomplished in complete defiance of the wishes of unit employees could lead to a situation where the employer has a good-faith doubt that the union, after the change, continues to have the support of a majority of the employees. Similarly, such a change could be accomplished in a manner inconsistent with the duty to represent fairly. All issues concerning alleged procedural irregularities in the accomplishment of the change should be submitted to Advice.

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cc: NLRBU

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